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In the Supreme Court

OF THE

United States

OCTOBER TERM 1959

No. 850

UNITED STATES OF AMERICA,
Petitioner,

vs.

HONORABLE PERSON M. HALL, Chief Judge, United States District Court for the Southern District of California,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 274 F. 2d 856.

QUESTION PRESENTED

The question presented is:

Whether the Court of Appeals abused its discretion in denying a writ of mandamus against the Chief Judge of the District Court which would have compelled him to vacate orders he had entered pursuant to the discretionary authority granted to him by Rule 71A(h) F.R.C.P. by which orders he referred to commissioners twenty-one separate condemnation cases instituted by the United States and in which orders he stated the grounds upon which he determined that the interest of justice would be served by such reference.

STATEMENT

Petitioner, on or about December 14, 1959, filed in the Court of Appeals for the Ninth Circuit a petition seeking from that court a writ of mandamus, or other extraordinary relief, requiring the Chief Judge of the United States District Court for the Southern District of California to vacate orders of reference which he had entered between May 7, 1959, and August 3, 1959 (Petition, 4-7) in twenty-one separate condemnation cases by which orders the judge had, pursuant to Rule 71A(h) F.R.C.P. referred to commissioners the issue of compensation in the cases (Petition, 3). The twenty-one cases were filed in connection with four government projects involving in all more than 44,000 acres, consisting of 496 parcels owned or claimed to be owned, or an interest in which was owned or claimed to be owned, by 2,200 persons

or entities. All cases involved in each project were referred to the same commissioners (P. 1-31).[1]

Among the cases referred were four in connection with property and easements taken for the Lemoore Naval Air Station project involving, as the District Court found, more than 30,000 acres (P. 4, 6); three in connection with land taken for the Success Dam and Reservoir project, involving in excess of 3,700 acres (P. 8-14); five in connection with the Terminus Dam and Reservoir project, involving in excess of 2,900 acres (P. 16-21); and nine cases in connection with the Casitas Dam and Reservoir project, involving in excess of 6,900 acres (P. 23). In the Lemoore Naval Air Station project there were involved 373 parcels and 1,575 owners (P. 1, 6); in the Success project there were involved 51 parcels and 330 owners (P. 8, 12, 14); in the Terminus project there were involved 33 parcels and 178 owners (P. 16, 21); in the Casitas project there were involved 39 parcels and 135 owners (P. 26). The property is of varying terrain and devoted to various uses (P. 27).

As the Court of Appeals noted in its opinion, the orders of reference indicated the grounds upon which they were based, including in addition to the congestion of the Court's calendar and the length of time which would be involved in trials by juries, "(1) the nature of the property, its varied terrain, and uses; (2) the kind or type and nature of the rights or interests in the property for which just compensa-

[1] "P" refers to the appendices to the Petition filed by the government in the Court of Appeals.

tion was claimed; (3) the complexity of the issues involved; (4) the improbability, if not impossibility, of trying the issue of just compensation of the various properties before one jury; and (5) the probability that the appointment of commissioners would result in more uniformity of awards for like property than could be expected if each were tried by a jury" (274 F. 2d at p. 859).

In its order of reference the Court noted these factors and noted also that the rights and interests for which just compensation must be determined are or may be of varied nature, and the issues will be complicated (P. 2).

The record does not show the present posture of the cases that were set for trial before the commissioners commencing on December 1, 1959 (P. 143).

ARGUMENT

It would, perhaps, seem proper to state at the outset that the petition for writ of mandamus filed by the United States in the Court of Appeals might primarily, not a disposition of a "case" or "controversy," but the establishment of a procedural policy for the District Court. The petition in the Court of Appeals, and the petition here, do not point out that the District Court abused its discretion in any particular case (and there are twenty-one separate actions involved), but assert rather that the policy of the Dis-

trict Court was wrong in appointing commissioners to hear the issue of compensation in all of them.[2]

Indeed, petitioner frankly argues in its petition for a reversal of the "trend" of all district courts to refer condemnation cases to commissioners (Petition, 12-13). A great part of petitioner's argument is in fact devoted to an attack upon the reference provision of Rule 71A(h) itself (Petition, 20-23).

But there is here involved a specific judgment entered in an original proceeding in the Court of Appeals. And the question before the Court is not trends or policies or various district court practices or the justification for the Rule, but the correctness of the specific judgment. We confine our discussion therefore to that matter.

THE COURT OF APPEALS PROPERLY DENIED THE WRIT OF MANDAMUS

1. The Denial of the Writ Was Within the Discretion of the Court of Appeals.

As this Court has said, "mandamus, prohibition, and injunction against judges are drastic and extraordinary remedies. . . . As extraordinary remedies they

[2] Petitioner attacks also the scope of the orders of reference because they provide for separate awards "with respect to each . . . parcel, interest, ownership or claim involved." The argument has no relevancy. The question here is solely one involving reference. As the authorities cited by petitioner indicate, the United States will have no further liability once it has paid the amount determined as just compensation, whether that amount be determined by the judge, a jury, or a commission. In any event, the scope of the amended orders was not too broad, as petitioner itself argues at pages 15-16 of its petition in the *Cunningham* case.

are reserved for really extraordinary causes." *Ex Parte Fahey*, 332 U.S. 258; 259. Especially in such cases, then, does the Court of Appeals have the discretion to deny writs of mandamus. For in every case these writs "may be granted or withheld in the sound discretion of the court." *Roche v. Evaporated Milk Association*, 319 U.S. 21, 25; *La Buy v. Howes Leather Co.*, 352 U.S. 249.

If the Court of Appeals decided, in its discretion, that this is not such an extraordinary cause as to warrant the issuance of mandamus against a judge, one can hardly say that the Court abused its discretion, particularly in the light of this Court's strictures.

And this is no extraordinary cause. If the District Court erred in making its order of reference, and as we show (infra, p. 11) the government has failed to demonstrate such error, then it may be corrected on appeal. *U. S. v. Bubler* (C.A. 5) 254 F.2d 876; *U. S. v. Theimer* (C.A. 10) 199 F. 2d 504.[3] Because such error, if it exists, can be corrected on appeal, the Court of Appeals properly denied mandamus. For mandamus may not be used as a substitute for appeal. *Ex parte Fahey*, 332 U.S. 258; *Roche v. Evaporated Milk Association*, 319 U.S. 21.

As the court pointed out in *United States v. Bobinski* (C.A. 2) 244 F. 2d 299, 301, the action of the

[3] It is of interest to note that both these cases, upon which the petitioner leans so heavily, were decided on *appeal*, not on a petition for extraordinary writ, and only in the *Theimer* case was the trial court reversed.

District Court "can be at most only erroneous, not beyond jurisdiction." The traditional use of the extraordinary writ which the government sought has been to confine a lower court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so. *Bankers Life and Cas. Co. v. Holland*, 346 U.S. 379, 382. There is, therefore, no occasion for the use of the writ in this case.

That the District Court has authority to refer condemnation cases to commissioners is beyond question. Rule 71A(h) explicitly gives it the power "in its discretion" to order that, "because of the character, location, or quantity of the property to be condemned, or for other reasons in the interests of justice" the issue of compensation shall be determined by commissioners.

All that is present in this case is a disagreement between the government and the District Court as to how the Court should exercise the discretion which the Rule so clearly vests in it. And the mandamus was sought to compel the Chief Judge to substitute the government's judgment for his own. It has never been thought that a judge could be mandamused into exercising in a particular way discretion which has been reposed in him. *In re Park & Tilford*, 245 U.S. 82; *Ex Parte Slayter*, 246 U.S. 128.

Beacon Theaters v. Westover, 359 U.S. 500 is not to the contrary. There the effect of the District Court's order was to deny to a party a constitutional right to a jury trial. The Constitution does not vest

in the court the discretion, on any basis, to deny that right, and the District Court acted beyond its power when it did so.

But there is no constitutional right of the United States to a trial by jury of the issue of compensation in condemnation cases. *Bauman v. Ross*, 167 U.S. 548; *U. S. v. Buhler* (C.A. 5) 254 F. 2d 876. The District Court is, as we said, vested with discretion. If its conclusion is wrong, it may be corrected on appeal. "Judicial administration," to which petitioner directs this Court's attention (Petition, 11), would break down completely if a court were subject to mandamus every time it made a discretionary interlocutory ruling with which a party did not agree.

The argument that appeal is inadequate because a Court of Appeals may be reluctant to reverse after a long trial could be made in every case involving unappealable interlocutory orders. Certainly it would be just as applicable in remand cases, where the courts have repeatedly denied mandamus. It may be added that this Court is here, and if, as petitioner suggests, the question is of such great importance, a review of an adverse Court of Appeals decision on an appeal may be sought of this Court.

It is respectfully submitted that this is not the "extraordinary cause" which warrants mandamus against a judge. The most that could be contended here is that the Chief Judge erred in the exercise of his discretion. Mandamus, we submit, is not the proper remedy to correct such error, even if the contention could

be upheld. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379.

2. There Was No Showing in the Court of Appeals of a Right to Mandamus.

Because the writ is one "reserved for really extraordinary causes," the courts have uniformly required that one who petitions for mandamus must show that his right thereto is "clear and indisputable." *Bankers Life and Cas. Co. v. Holland*, supra, (p. 384).

The showing made by the government in its application for the writ was only its claim that the Chief Judge of the District Court referred substantially his entire docket of condemnation cases to commissioners;[1] that the orders of reference all made the same findings, some of the orders containing the findings only by reference to other orders; and that the character of the property was similar to that in many other condemnations. In the record were affidavits of various Assistant United States Attorneys (P. 33-78) in which they described the various tracts condemned and in one of which was a tabulation with respect to condemnation cases filed in the Southern District of California. The government argued that those affidavits showed that the findings of the Chief Judge were wrong.

One of the alternative grounds stated in Rule 71A (h) upon which the District Court may base an order

[1]It does not appear that the record supports the claim. The tabulation in the affidavit of the Assistant United States Attorney (P. 34) shows 111 pending cases on June 30, 1959, only 21 of which apparently have been referred to commissioners by the Chief Judge.

of reference is "quantity of property." In the Lemoore Naval Air Station project the land involved consisted of more than 30,000 acres—almost 47 square miles (P. 1). In the Casitas Dam project the land involved is almost 7,000 acres—over 10 square miles (P. 26). Who is to say that 30,000 acres or 7,000 acres is not a "quantity of land" as contemplated by the Rule?[5] Is the government's mere statement that that is not sufficient to sustain an order of reference a "clear and indisputable" showing of a right to mandamus? Another of the alternative bases stated in the Rule is the character of the property. Is the government's bare statement that the character of the property is similar to that in many other condemnations a "clear and indisputable" showing of a right to mandamus? And so with the other bases upon which the Chief Judge rested his order. A "clear and indisputable" right to mandamus would, it is submitted, require more than a mere showing of disagreement with the conclusions of the judge. At the least it must show clearly and indisputably either that the judge exceeded his authority or that he abused his discretion. The Court of Appeals found that the government failed to sustain that burden.

Petitioner's argument that the Chief Judge's orders referring twenty-one cases to commissioners indicate an improper exercise of judicial discretion

[5] Some indication of what is meant by "quantity of land" is given in the Committee Notes: "In a great number of cases involving only sites for buildings or other small areas, where use of a jury is appropriate, a jury may be chosen." Notes of Advisory Committee on Rules, 28 U.S.C.A. 71A (1959 Supp.) p. 354.

carries no persuasion in the absence of a clear showing that in every one of the cases the facts did not justify reference. It must be remembered that the writ of mandamus sought in this case would have compelled the Chief Judge to vacate his orders with respect to every one of the twenty-one cases. To sustain such a writ, if it is sustainable in any event, would require a showing that the Chief Judge abused his discretion in every single case.[6] There is no such showing.

3. The District Court Did Not Abuse Its Discretion.

Purposely Rule 71A(h) gives to the District Court a broad discretion in determining whether condemnation cases shall be referred to a commission. As the Advisory Committee noted:

> "It would be difficult to state in a rule the various conditions to control the District Court in its choice and we have merely stated generally the matters which should be considered by the District Court." Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 71A (1959 Supp.) p. 354.

That the Chief Judge in these cases did take into consideration the very matters which are stated in the Rule is evident from the orders themselves. As the Court of Appeals pointed out in its opinion, the Chief Judge considered the quantity and nature of the property and its varied terrain and uses, the kind or type

[6] On the record before the Court of Appeals, it would have been impossible for that Court to have granted mandamus as to merely some of the cases, even if that were permissible.

or nature of the rights or interests in the property, the complexity of the issues involved, the improbability, if not impossibility, of trying the issue of just compensation of the various properties before one jury, and the probability that the appointment of commissioners would result in more uniformity of awards for like property. To a great extent those are the very matters which the Rule requires the court to consider. Surely it cannot be successfully contended that a judge in his order must state the processes of ratiocination by which he determined that these factors required trial by commissioners in order that the interest of justice be properly served. It is sufficient that he state the basis upon which the order rests. When the statement is adequate in law, as it is in this case, we know of no authority under which he can be compelled to arrive at a conclusion different from that which his judicial conscience impelled. Surely if the grant of discretion given to the judge by the Rule means anything, it means that he "must exercise his authority according to his own understanding and conscience." *United States v. Shaughnessy*, 347 U.S. 260, 267.

In *United States v. Theimer* (C.A. 10) 192 F. 2d 501, which reversed on appeal an order of reference, the Court pointed out that "the trial court made no statement or finding of fact as to what prompted it to conclude that the interest of justice demanded the invocation of the extraordinary, rather than to permit the ordinary procedure contemplated by the Rule." (p. 504)

But the Chief Judge in the instant cases stated with a great deal of specificity the factors which induced him to conclude that the interest of justice required a reference, factors which, as we said, were to a great extent those stated in the Rule. The *Theimer* case, therefore, furnishes no standard by which this case can be judged.

In the recent and as yet unreported case of *Benecke v. Weick* (C.A. 6) .....F.2d ..... (decided March 2, 1960), the court denied a writ of mandamus to compel the trial judge to vacate an order of reference, where the trial court's statement of the basis for his order closely paralleled the finding of the Chief Judge in this case. The Court said:

> "Under Rule 71A(h), Rules of Civil Procedure, the trial judge has the right in his discretion to enter an order that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a Commission of three persons appointed by the court. In the present case, the trial judge exercised the discretion vested in him, expressing the opinion that it was in the interest of justice that the entire case be referred to a commission."[*]

The Sixth and Ninth Circuits are therefore in agreement that under the circumstances a writ of mandamus should not issue to compel a trial judge to va-

[*] The text of the opinion is printed as an appendix to this brief. It may be noted that it was the landowners, not the government, who requested a jury trial and sought mandamus in that case.

cate an order of reference. Insofar as we have been able to find, no Court of Appeals has decided to the contrary. The courts have doubtless realized that granting mandamus in such a case would open a Pandora's box of evils far greater than any that might result from a mere error in the exercise of a discretion lodged in a judge.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, May 6, 1960.

Respectfully submitted,
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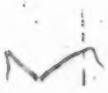
(Appendix Follows.)



Appendix

BENEKE v. WEICK

U. S. Court of Appeals, Sixth Circuit, March 2, 1960

On petition for writ of mandamus. Before McALLISTER, Chief Judge, MIELER and CECIL, Circuit Judges.

PER CURIAM. On March 9, 1956, the United States filed a condemnation suit in the District Court for the Northern District of Ohio against forty-six defendants owning twenty-three separate parcels of land aggregating 44.314 acres. On October 1, 1959, the District Judge entered an order appointing Commissioners to determine the issue of just compensation as to all defendants, overruling objections on the part of persons having an interest in twelve parcels, who had requested a jury trial of said issue.

This order was in accordance with the views expressed by him in a written Memorandum filed a short time prior thereto. In this Memorandum it was pointed out that the tracts of land owned by those opposing the appointment of the Commission varied in size from .057 to 4.530 acres, and totaled approximately 45% of the land taken, that eight separate jury trials would be required, in which trials essentially the same expert evidence would be adduced, as the tracts were for the most part adjacent to each other and would be affected by the same considerations in determining their valuation, that such procedure would be repetitious, wasteful of time and money and inimical to the best interests of justice,

that the docket in his court was a congested one, and that it was in the interest of justice that the entire case be referred to a three man commission and not determined piecemeal in repetitious individual jury trials.

On October 10, 1959, the eight petitioners herein, who had previously requested jury trials, moved for a reconsideration of the order of October 1, 1959, which motion was overruled on November 18, 1959. In overruling the motion, the District Judge referred to the location of the land outside the city of Cleveland, where the trial would be held; to the fact that the tracts owned by the petitioners were contiguous to other tracts of more than eighty times in area which were involved in the same action and to which basically the same considerations would apply, which tracts were being evaluated by the Commissioners without objection from the owners thereof; and to the fact that the use of Commissioners for evaluating all of the property involved would tend to produce uniformity in valuation throughout the entire area involved.

The petitioners thereupon filed their present action in this court under the provisions of the all-writs statute, Section 1651(a), Title 28, U. S. Code, praying that an order be issued staying proceedings in the District Court and to strike from the order of October 1, 1959, such part thereof as would deny a jury trial to these petitioners.

We have heretofore on several occasions pointed out that under Supreme Court rulings mandamus,

against a judge under the all-writs statute is an extraordinary remedy and is reserved for really extraordinary causes. It cannot be used as a substitute for an appeal. Roche v. Evaporated Milk Association, 319 U. S. 21, 26; Ex. parte Fahey, 332 U. S. 258; Bankers Life & Casualty Co. v. Holland, 346 U. S. 379; Massey-Harris-Ferguson v. Boyd, 242 F.2d 800, C. A. 6th, cert. denied, 355 U. S. 806; Walker v. Brooks, 251 F.2d 555, C. A. 6th; Allstate Insurance Co. v. United States District Court, 264 F.2d 38, C. A. 6th; Lemon v. Druffel, 253 F.2d 680, C. A. 6th, cert. denied, 358 U. S. 821; Panhandle Eastern Pipe Line Co. v. Thornton, 267 F.2d 459, C. A. 6th, cert. denied, 361 U. S. 820. In the case last cited we quoted with approval the following statement from In re Josephson, 218 F.2d 174, C. A. 1st; "Accordingly, we serve notice that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus."

In the case under consideration the petitioners were not entitled to jury trial as a matter of right. Bauman v. Ross, 167 U. S. 548, 593. Under Rule 71A(h), Rules of Civil Procedure, the trial judge has the right in his discretion to enter an order that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a Commission of three persons appointed by the court. In the present case, the trial judge exercised

the discretion vested in him, expressing the opinion that it was in the interest of justice that the entire case be referred to a Commission. The order is subject to review for alleged abuse of discretion on his part when a final judgment is entered. United States v. Theimer, 199 F.2d 501, C. A. 10th; United States v. Buhler, 254 F.2d 876, C. A. 5th. In the Theimer case it was held *on final review* that there was an abuse of discretion. But, it was not a mandamus case. In the Buhler case the Court of Appeals held *on review* of the final judgment that there was no abuse of discretion in denying the demand for a jury trial.

In Ex parte Simons, 247 U. S. 231, and Black v. Boyd, 248 F.2d 156, C. A. 6th, relied upon by the petitioners, the applicants were entitled to a jury trial as a matter of right. There was no discretion vested in the District Judge to deprive them of that right.

The fact that the ruling is an important one in the conduct of the trial and that, being an interlocutory order, a review of it on appeal must be postponed until after the case has been disposed of in the District Court, does not entitle the petitioners to an immediate review of the ruling. City of Morgantown v. Royal Insurance Co., Ltd., 337 U. S. 254, 258-259; Massey-Harris-Ferguson v. Boyd, supra, 242 F.2d 800, 802, C. A. 6th, cert. denied, 355 U. S. 806.

Without expressing at this time any opinion on the correctness of the ruling, we are of the view that the case presented is not of such an extraordinary nature as to justify the issuance of the writ applied for. The application for the writ is denied.